Supreme Court, U.S.

98 1345 FEB 8 - 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK B. RASMUSSON, et. al.,

Petitioners,

v.

LAWRENCE E. FROST, et. al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SANDRA J. SHEPPARD, Esq.
Counsel of Record
6915 Boeing Drive
El Paso, Texas 79925-1107
(915) 772-4616

Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court and in the alternative, the Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power, by summarily affirming the district court's granting of summary judgment on the issue of qualified immunity to both state, federal respondents, officers and private respondents, despite substantial issues of material facts concerning officers and private parties' improper motives and denying access to court, contrary to relevant decisions of this court.

2. Whether the Court of Appeals has decided an important federal question that the conduct of government agents in originating a criminal design, implanting in an innocent person's mind, while playing on the innocent person's fears, the disposition to believe that certain criminal activities are being carried on, and attempting to induce that person to assist the agents in fabricating a criminal nexus for the expressed purpose of using that fabricated criminal nexus against an investigatory target who is not engaging, has not engaged or shown any reasonable indication that he is likely to engage in illegal activity of a similar type being planted in the mind of the innocent person and where there is no legitimate ongoing sting operation, resulting in continuing unreasonable searches and seizures and unlawful disclosures to non law enforcement third parties, resulting in loss of liberty and property, constitutes an abuse of government power within the meaning of the Fourth, Fifth and Fourteenth Amendments, an issue that has not been, but should be, settled by this court?

3. Whether the Court of Appeals has decided an important federal question in upholding the District Court's ruling that conduct of respondent agents and private parties, where the agents solicited rumors and/or false information from private parties who in term intentionally and knowingly related rumors and/or false information to agents; where respondent agents placed in their affidavits and the government's system of records, voluminous misstatements, misrepresentations, false

statements and fabrications material to probable cause and other just outright inflammatory and vicious; where supervisors, prosecutors, and /or Assistant U.S. Attorneys, intentionally and knowingly approve, condone, ratify, or acquiesce to Respondents' misconduct, all for expressed purpose of causing Petitioners to be subjected to unreasonable searches and seizures and for expressed purpose of making unlawful disclosures to non-law enforcement third parties, where no extant criminal nexus, thereby resulting in loss of liberty and property, constitute Fourth, Fifth and Fourteenth Amendment violations, contrary to *Bryson v. United S States,* 396 U.S. 64 (1969); *United States v. Wong* 431 U.S. 174 (1977); *La Chance v. Erickson,* 522 U.S. 262 (1998), and other relevant cases.

4. Whether the Court of Appeals has decided an important federal question in upholding the District Court's ruling denying the Plaintiffs' motion to stay proceedings until such time as prior District Court judge, who has unique knowledge of his personal subjective thoughts behind rulings which effectively invalidated or discredited evidence adduced in criminal trial and now is being asserted by Respondents, has reviewed Plaintiffs' motion to (1) strike evidence (2) transfer matter as a connected case to prior District Court judge's docket, or in the alternative, (3) to allow Plaintiffs to amend their witness list and offer additional evidence on issue of qualified immunity constitutes denial of procedural due process under Fifth and Fourteenth Amendments so as to restrict Plaintiffs' access to court, an issue that has not been, but should be, settled by this Court?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings are as follows:

1. PETITIONERS

Mark B. Rasmusson
Deborah L. Rasmusson
Andrew A. Gantkessy
Rasmark Jet Charter, Inc.

Attorney for Petitioners

Sandra Jackson Sheppard
SHEPPARD & ASSOCIATES
6915 Boeing Drive
El Paso, TX 79925-1107

2. RESPONDENTS

Lawrence E. Frost
Fred Schroeder
Daniel Urbina
Michael Triola
Paul Neely
Jimmy B. Searls
Curtis R. Compton
Walter J. King
James R. Straba
Robert L. Holler
Michael Wilczewski
Lea Gonzalez
Amy Estrada
Irma Rodriguez
Gurdit Dhillon
Scott Doe
Flow Doe

Steven E. Perkins
Elias Chavez
Rafael Aguirre
Tom Lenox
Fonda Hivick
Robert Martinez
Socorro G. Simmons
Carol Hallett
John E. Hensly
Donald L. Reay
Michael T. Lappe
James F. Tighe
Larry Brown
Joe Acosta
Eric Mills
George J. Weise
John or Jane Does 1 through 25 are agents or supervisors or employees of the U.S. Customs Service or the U.S. Border Patrol or the Immigration and Naturalization Service or the Bureau of Alcohol, Tobacco, & Firearms or the U.S. Secret Service or the U.S. Marshals Service or the Federal Bureau of Investigation or the Drug Enforcement Administration or the Internal Revenue Service.

Attorney for Federal Respondents
R. Barry Robinson
Assistant U.S. Attorney
816 Congress Avenue, Suite 1000
Austin, TX 78701

County of El Paso
Leo Samaniego, El Paso County Sheriff
Neil Baker
Jerry Keith

Attorney for County of El Paso Respondents
Eduardo R. Castillo
Assistant County Attorney
500 East San Antonio
El Paso, TX 79901

El Paso Police Department
Russ Leach, Chief of Police

Attorney for City of El Paso Respondents
John Gates
Assistant City Attorney
2 Civic Center Plaza
El Paso, TX 79901

George Salas
James Holland

Attorney for El Paso Police Department Officers
Duane Baker
Attorney At Law
303 Texas Ave., Suite 1400
El Paso, TX 79901

Gail Beech
Aero Freight, Inc.
Chris Hinez

Attorney for Private Parties
Robin Collins
Attorney At Law
1220 Montana
El Paso, TX 79902

United States Department of Justice

Attorney for United States Department of Justice
Joseph A. Pitzinger
Attorney, Tax Division
Department of Justice
717 N. Harwood, Suite 400
Dallas, TX 75201

Joseph Sudomir

Attorney for Joseph Sudomir
Mark N. Osborn
Attorney At Law
2000 Norwest Plaza, 17th Flr
El Paso, TX 79901

Mark Short
Viking Aviation
Joe Teuchert
John or Jane Does 26 through 75 are Officers in The Texas Department of Public Safety

Unrepresented Parties

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS vii

INDEX OF APPENDICES. x

TABLE OF AUTHORITIES xi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT. 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT. 18

I.

The Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court And In The Alternative, The Court of Appeals Has Sanctioned Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power, By Summarily Affirming The District Court's Granting Of Summary Judgment On The Issue Of Qualified Immunity To Both State, Federal Respondents Officers And Private Respondents, Despite Substantial Issues Of Material Facts Concerning Officers And Private Parties' Improper Motives And Denying Access To Court, Contrary To

Relevant Decisions Of This Court 18

II.

The Court Of Appeals Has Decided An Important Federal Question That The Conduct Of Government Agents In Originating A Criminal Design, Implanting In An Innocent Person's Mind, While Playing On The Innocent Person's Fears, The Disposition To Believe That Certain Criminal Activities Are Being Carried On, And Attempting To Induce That Person To Assist The Agents In Fabricating A Criminal Nexus For The Expressed Purpose Of Using That Fabricated Criminal Nexus Against An Investigatory Target Who Is Not Engaging, Has Not Engaged Or Shown Any Reasonable Indication That He Is Likely To Engage In Illegal Activity Of A Similar Type Being Planted In The Mind Of The Innocent Person And Where There Is No Legitimate Ongoing Sting Operation, Resulting In Continuing Unreasonable Searches And Seizures And Unlawful Disclosures To Non Law Enforcement Third Parties, Resulting In Loss Of Liberty And Property, Constitutes An Abuse Of Government Power Within The Meaning Of The Fourth, Fifth and Fourteenth Amendments, An Issue That Has Not Been, But Should Be, Settled By This Court 24

III.

The Court Of Appeals Has Decided An Important Federal Question In Upholding The District Court's Ruling That Conduct Of Respondent Agents and Private Parties, Where The Agents Solicited Rumors And/Or False Information From Private Parties Who In Term Intentionally And Knowingly Related Rumors And/Or False Information To Agents; Where Respondent Agents Placed In Their Affidavits And The Government's System Of Records, Voluminous Misstatements, Misrepresentations, False Statements And Fabrications Material To Probable Cause And Other Just Outright Inflammatory And Vicious; Where Supervisors, Prosecutors, And /Or Assistant U.S. Attorneys, Intentionally And Knowingly Approve, Condone, Ratify, Or Acquiesce To Respondents' Misconduct, All For Expressed Purpose Of Causing Petitioners To Be Subjected To Unreasonable Searches And Seizures And For Expressed Purpose Of Making Unlawful Disclosures

To Non-Law Enforcement Third Parties, Where No Extant Criminal Nexus, Thereby Resulting In Loss Of Liberty And Property, Constitute Fourth, Fifth And Fourteenth Amendment Violations, Contrary To *Bryson v. United States,* 396 U.S. 64 (1969); *United States v. Wong*, 431 U.S. 174 (1977); *La Chance v. Erickson,* 522 U.S. 262 (1998), And Other Relevant Cases. 26

IV.

The Court Of Appeals Has Decided An Important Federal Question In Upholding The District Court's Ruling Denying The Plaintiffs' Motion To Stay Proceedings Until Such Time As Prior District Court Judge, Who Has Unique Knowledge Of His Personal Subjective Thoughts Behind Rulings Which Effectively Invalidated Or Discredited Evidence Adduced In Criminal Trial And Now is Being Asserted By Respondents, Has Reviewed Plaintiffs' Motion To (1) Strike Evidence (2) Transfer Matter As A Connected Case To Prior District Court Judge's Docket, Or In The Alternative, (3) To Allow Plaintiffs To Amend Their Witness List And Offer Additional Evidence On Issue Of Qualified Immunity Constitutes Denial Of Procedural Due Process Under Fifth And Fourteenth Amendments So As To Restrict Plaintiffs' Access To Court, An Issue That Has Not Been, But Should Be, Settled By This Court 27

CONCLUSION 30

APPENDIX . . . . . *infra*

INDEX OF APPENDICS

APPENDIX A	Court Orders
APPENDIX B	Petitioners' Third Amended Original Petition
APPENDIX C	Petitioners and Supporting Affidavits
APPENDIX D	Respondents' Deposition Excerpts
APPENDIX E	Respondents' Affidavits, Admissions and Investigation Reports
APPENDIX F	Petitioners' Documentary Evidence Supporting Third Amended Original Petition and Affidavits
APPENDIX G	Expert Witnesses Affidavits
APPENDIX H	Supplemental Appendix To Appendices C and F

TABLE OF AUTHORITIES

United States Supreme Court Cases: **Page:**

Ashe v. Swenson, 397 U.S. 436 (1970). 23

Anderson v. Creighton, 483 U.S. 635 (1987). 19

Anderson v. Liberty Lobby, 477 U.S. 242 (1986). 19

Bivens v. Six Unknown Named Agents of
Federal Bureau of Narcotics,
403 U.S. 388 17,24

Bryson v. United States, 396 U.S. 64 (1969) 27

Butz v. Economou, 438 U.S. 478 (1978) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). 19

Crawford v. Britton, 523 U.S. 574,
118 S.Ct. 1584(1998) 19,20

Franks v. Delaware, 438 U.S. 154 (1978). 23

Green v. United States, 355 U.S. 184 (1957) 28

Harlow v. Fitzerald, 457 U.S. 800, 820 (1982). 19,20,21,23

Illinois v. Gates, 462 U.S. 213 (1983) 23

Jacobson v. United States,
503 U.S. 540, 542 (1992) 25

La Chance v. Erickson, 522 U.S. 262 (1998) 27

Leatherman v. Tarrant County Narcotics

Intelligence and Coordination Unit,
113 S. Ct. 1160, 1163 (1993). 24

Nix v. Whiteside, 475 U.S. 157, 173 (1986) 27

Nixon v. Fitzgerald, 457 U.S. 731 (1982). 20

Sherman v. United States, 356 U.S. 369, 372 (1958) 25

Sorrell v. United States, 287 U.S. 435, 441 (1932)

Wilson v. Garcia, 471 U.S. 261 (1985) 21,22

Wood v. Strickland, 420 U.S. 308, 319-22 (1975) 19

United States v. Martin Linen Supply Co.,
430 U.S. 564, 571 (1977) 29

United States v. Russell, 411 U.S. 423, 431 (1973) 26

United States v. Wong, 431 U.S. 174 (1977) 27

Wilson v. Garcia, 471 U.S. 261 (1985) 21,22

Texas Supreme Court Cases:

Delgado v. Burns, 656 S.W.2d 428, 429
(Tex. 1983) 22

Woods v. William M. Mercer, Inc.,
769 S.W.2d 515, 518 n.2 (Tex. 1989). 22

Texas Appellate Court Cases:

Jennings v. Burgess, 917 S.W.2d 790, 793 (1996) 22

Zale Corp., 520 S.W.2d at 891 22

United States Constitution:

U.S. CONST. amend. I 1,15,17

U.S. CONST. amend IV..... 2,15,21,23

U.S. CONST. amend V 2,15,17,21,23,24

U.S. CONST. amend. XIV 2,15,17,21,23,24

United States Statutes:

Bank Secrecy Act 2,4

The Privacy Act 2,15,17

28 U.S.C. § 1254(l) 1

42 U.S.C.S. § 1873..... 24

42 U.S.C. § 1985 2,17

42 U.S.C. § 1983 1,2,17,20,21,24

Mark B. Rasmusson ("M. Rasmusson"), Deborah L. Rasmusson ("D. Rasmusson), collectively ("the Rasmussons"), Andrew A. Gantkessy ("Gantkessy"), and Rasmark Jet Charter, Inc. ("Rasmark"), petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The unpublished Per Curiam opinion of the court of appeals is reproduced in separate Appendix A, at App. 1-2 and the unreported opinion of the district court at App.3-95.

JURISDICTION

(i) Petitioners sought relief under 42 U.S.C. § 1983, The Privacy Act, and *Bivens Doctrine*, and pendant state law claims, in the District Court.

(ii) Petitioners seek review of the Per Curiam Opinion of the Fifth Circuit Court of Appeals entered on November 9, 1998.

(iii) Petitioners rely upon 28 U.S.C. § 1254(1) to confer on this Court jurisdiction to review the decision of the Court of Appeals on writ of certeiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

UNITED STATES CONSTITUTION

U.S. CONST. amend. I.
Congress shall make no law . . . abridging the freedom of speech , . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. IV.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; . . .

U.S. CONST. amend. XIV.
. . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

Title 42, U.S.C. § 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The Privacy Act

STATEMENT OF CASE

This case concerns whether state and federal law enforcement officers, in conjunction with private parties, are all, including the private parties, entitled to qualified immunity from civil damages for unconstitutional violations committed while conducting a continuous investigation against predetermined targets, where such investigation is in retaliation against the targets for exercise of their First Amendment rights to petition the Government for a redress of grievances, has continued for a period of time in excess of five years, can continue to be renewed or recast indefinitely against the same predetermined targets, and lastly, can be so continued indefinitely where there is no legitimate sting operation, evidence of the commission of a crime, or evidence of any ongoing criminal nexus.

Because the petitioners complain of unlawful conduct from as early as 1987 and that this unlawful conduct was continuous up to and including the date of the filing of lawsuit, the record is necessarily voluminous, and for this reason, the petitioners incorporate as though fully set forth herein petitioners' third amended original petition in Appendix B, App.121-255; all petitioners' and other supporting affidavits, previously cited in Appendix C; all expert witnesses affidavits, previously cited in Appendix G; including all supporting documentation previously cited in Appendix F. In addition to the "State of the Case," this Court is respectfully referred to the appendices for more particularity, to assist in unraveling the material factual disputes.

The Respondents, and or their respective precedessors, have been investigating Petitioners Mark B. Rasmusson ("M. Rasmusson"), Deborah L. Rasmusson ("D. Rasmusson"), collectively, ("the Rasmussons") and Rasmark Jet Charter, Inc. ("Rasmark") since approximately 1988, and against Petitioner Andrew A. Gantkessy ("Gantkessy") since approximately 1993. Failing to succeed in understanding the disruption and destruction caused to their lives, their business, and their inability to stop the continuous disruption and destruction, even after appealing to Congressional leaders and the Federal Agency in question, the Petitioners were forced to file this

lawsuit on November 21, 1995.

The Respondents generally contend that they have been acting within the scope of their authority (see generally, Appendix E, Respondents' Affidavits, Admissions and Investigation Reports at App.908), that all actions taken at any time against any of the Petitioners have been lawful, and that all of their actions have been performed in good faith. The Respondents further contend that the investigation initiated against the Rasmussons initially, and later Gantkessy, was based on allegations of drug smuggling, money laundering, violations of the Bank Secrecy Act, kickback and or payoff schemes, mail fraud, and tax evasion.

The Rasmussons generally contend that the Respondents initiated an official investigation against them only after they complained to a U.S. Senator about the USCS. See generally App.1149–1165; the last response from the USCS being received in October of 1989. Petitioner Gantkessy contends that the Respondents began a vicious cycle of retaliation against him because he protested and refused to fabricate lies on the Rasmussons and Rasmark and refused to wear a wire for the purpose of helping the Respondents to make it appear as though the Rasmussons were engaging in some kind of kickback or payoff scheme against the Ford Motor Company ("Ford"), Gantkessy's now former employer, when he, Gantkessy, knew such allegations were false, resulting in great emotional and economic harm to the Petitioner (App.1480).

The district court relied on the respondents use of stale facts in their affidavits of November 19, 1993 (App.912-946), to support the respondents' position that the Rasmussons were involved in the Jesus Flores ("Flores") drug trafficking/money laundering organization. , (App.5, ¶ 2-5), in which the Rasmussons and Rasmark were investigated and M. Rasmusson indicted, tried and acquitted. The petitioners contend that there is a material factual dispute on the lawfulness or unlawfulness of the respondents' investigation ab initio. First, the respondents, and/or their respective predecessors and agencies, had been tracking Flores since as early as 1984, knew Flores associates, sources

of contraband, and modes of operation; none of years of investigation did the petitioners ever have any contact with Flores' drug trafficking, money laundering operations. The petitioners corroborated this contention with respondent Steven E. Perkins ("Perkins") meticulously detailed wiretap affidavit, (App.1169-1182). Second, the petitioners contend that the only reason the DEA respondents swept M. Rasmusson into Flores' superceding indictment is that they joined in the baseless investigation initiated by the USCS in 1989 against the Rasmussons. The petitioners presented to the district court DEA reports of investigation ("DEA-6's") showing where the respondent Perkins, and others, first launched its Organized Crime Drug Enforcement Task Force (OCDETF) investigation the Rasmussons and Rasmark about August 17, 1990, after Flores had been arrested on June 19, 1990 and indicted on June 20, 1990, and this so-called investigation (consisting of repeated interviews of the Rasmussons, their employees, subpoena of Rasmark business records, interview of Rasmark outside accountant and subpoena of numerous financial records from him) ended with the indictment of M. Rasmusson on September 19, 1990. See generally, App. 1183-1214 for DEA-6's concerning interviews.

The basis of the indictment, according to the respondents, and/or their predecessors and agencies, was the fact that Flores on approximately six to nine times chartered Rasmark aircraft for personal trips, none of which M. Rasmusson personally flew, but in any event, none of which had anything to do with Flores' criminal enterprise, as Flores very carefully kept his criminal life to himself and came to Rasmark as a legitimate business owner of a home remodeling company, which in fact did conduct legitimate business in the El Paso, Texas area. The petitioners contend the respondents reasons were a mere pretext to cover their unlawful acts. In support of this contention, the petitioners presented to the district court excerpts from the criminal trial transcript showing Flores also used the services of many other legitimate businesses, more intimately involved in Flores' criminal operation than the trips taken on Rasmark aircraft, and these businesses, too, were paid in cash; yet, none of these businesses were swept into the superceding indictment, but instead, testified as witnesses for the Government. See Rodeway Inn in Ontario, Canada (App.1176, ¶ k;

1240); Contel Cellular out of Atlanta, Georgia (1246); Easy Living in El Paso, Texas (App.1250); Industrial Communications in El Paso, Texas (App.1253; 1255); Southwestern Bell Telephone in El Paso, Texas (App.1173, ¶ f; 1174, ¶ b; 1178, ¶ h; 1258); and Tapaco Aircraft Parts and Accessories (App.1272-1278).

The petitioners further presented to the district court excerpts from the criminal trial transcript showing testimony received from 43 Government witnesses, including, in addition to the above-named legitimate businesses, officers from the Respondents' respective state and federal agencies, and in some instances, the very same officer involved in this present lawsuit,(App.1215-39). DEA Special Agents Thomas Lenox ("Lenox") and Steven E. Perkins ("Perkins"), respondents in this present case, testified repeatedly against Flores, using evidence that could not be used, and was not used, against M. Rasmusson. Additionally, witnesses from Rasmark testified on behalf of the Government: D. Rasmusson, as custodian of Rasmark's business records, two pilots, one former office manager, the dispatcher/sales representative, and Rasmark's outside accountant. And approximately 140 items of evidence, out of approximately 1,176 total items of evidence obtained during the OCEDETF and DPS investigation, were admitted into evidence. After the Government rested its entire case, the Honorable Chief Judge Hudspeth granted a judgment of acquittal before submission to the jury (App.1288, pg. 1042).

The foregoing facts are critical to the petitioners because the USCS respondents admitted they were investigating the Rasmussons as early as 1989. See deposition of USCS Special Agent Lawrence E. Frost at App.373, pg.19, L8-10. Flores did not first appear at Rasmark until February of 1990, (App.1195), and the DEA OCDETF records conclusively show neither the Rasmussons nor Rasmark was ever a part of that investigation.

Equally critical to the petitioners' contention of a bogus investigation is that the respondents knew the petitioners were not engaging any criminal activity and that all of their money was derived from either M. Rasmusson's inheritance, where millions of dollars were

paid to the IRS for taxes, or Rasmark. See generally, App.1142-1148.

In further support of the petitioners' contention that the respondents were conducting a bogus investigation is the failure of the respondents to utilize the investigative tool of researching the background, which in this case, was contained within their own records. Some of the respondents testified that they might have heard about the background as stated above, or maybe even read some of the background; some admitted they never reviewed any of the background; and some said it was not their responsibility to learn about the background. Representative examples are: Lawrence E. Frost ("Frost"): App. 377-90; Lenox: 462-65; Salas: 495-500; Hivick: 530-33; Schroeder: 566-74; Wilczewski: 801-02; Respondent Eric Mills ("Mills") during his January 1997 deposition testified "I don't recall having reviewed anything from that case [DEA OCDETF Flores investigation]." (Record below, depo. Pg.20-21). Internal Revenue Service ("IRS") SA Fonda Hivick ("Hivick") testified she was not even aware that the USCS SA John Peterson ("Peterson") had conducted an earlier investigation of the petitioners, (App.548, pg.35, L2-L9).

There is a gap in the respondents' so-called investigation; the period subsequent to M. Rasmusson's acquittal in July of 1991 and the continuation of the investigation by the alleged newly formed USCS Financial Task Force (FTF) in March of 1992. The petitioners contend that there is a material factual dispute on whether the FTF ever existed as a formal task force, or whether it was formed as a pretext for this lawsuit. The petitioners support this contention with the respondents' own records. The respondent Frost was alleged to be the lead case agent for the FTF; he prepared three affidavits none of which ever mentions a FTF. See affidavits: May 26, 1992 (App.908, ¶ 3); November 19, 1993, two of same date essentially same, only one in appendix, (App.913, ¶ 6). The respondents gave conflicting accounts on the initiation of the investigation and when. Frost testified that the Rasmussons and Rasmark were part of a larger money laundering investigation, which he identified as Guillermo Portillo ("Portillo"), allegedly connected to Flores through Portillo's alleged associate (App.920, ¶ 26-29) and connected to the Rasmussons through Portillo

(App.391-394); however, no where in the three affidavits identified above does the name Portillo appear. The petitioners contend the respondents were again fabricating the appearance of a criminal nexus, simply because Rasmark had a legitimate business relationship with Portillo to maintain his legal aircraft, all found in the Federal Aviation Administration ("FAA") Aircraft Registry Records, (App.1166-1167); FAA Aircraft Lien Release where Rasmark properly filed lien for nonpayment of bill, (App.1168a-1168b); and letter dated March 7, 1991 from Rasmark acknowledging receipt of payment and ending of business relationship, (App.1168). Everything that had anything to do with Portillo and Rasmark occurred and concluded months before DEA OCDETF criminal trial of M. Rasmusson, therefore, Frost's testimony is per se false.

To further support petitioners' contention of a bogus investigation, DEA SA Thomas Lenox ("Lenox"), one of the two lead case agents for the DEA OCDETF investigation against Flores, Perkins being the other, testified concerning allegations made by Frost in his November 19, 1993 affidavit. Frost states he received a written report from FBI respondent Joe Acosta ("Acosta"), in which a confidential informant alleged stated Flores and his associate Bermudez were introduced to M. Rasmusson in 1988; that M. Rasmusson became involved in money laundering with Flores, was buying aircraft parts with the proceeds of trafficking, involved with Hector Saenz who worked with Ricardo Valdez in their money laundering activities; that M. Rasmusson traveled throughout the United States in his aircraft collecting proceeds of trafficking; and that M. Rasmusson received approximately $500,000.00 in controlled substance proceeds from Flores during 1989 and 1990, which M. Rasmusson allegedly used to purchase aircraft parts, aircraft engines and pay expenses during his money laundering activities; see (App.920, ¶ 25-29). Lenox testified that he does not believe the DEA OCDETF uncovered any facts that M. Rasmusson had received over $500,000 in money laundering proceeds from Flores (App.467-68). Regarding evidence that indicated M. Rasmusson was purchasing aircraft parts as part of Flores money laundering operation, Lenox testified "I don't recall that, no." (App.468, L8-13) Regarding the FBI confidential source, Lenox

testified "[t]he FBI didn't tell us anything. We don't get along very well, the DEA and the FBI, so, no." (App.468, L14-20).

To further support the petitioners' contention of bogus investigation, the boxes in which the FTF seized all of Rasmark's business records on November 22, 1993 contained an evidence label showing the name "Portillo" and the case number: "EP02CR90EP0013 - PORTILLO"; see App. 1340. This is the same case number the respondents placed the investigation against the petitoners: affidavit of Assistant Special Agent in Charge (ASAC) Donald Reay ("Reay"), second only to the top official in the El Paso-Albuquerque Office, SAC Michael Lappe´ ("Lappe´), at App.1035, ¶ 2. Reay's declaration lends further support to the petitioners' contention where he states "the Rasmark case was adopted under Ops Transwestern because it was an 'air transport' initiative and Rasmark is an air transport company." Id. The petitioners presented to the district court documentation showing Ops Transwestern had absolutely nothing to do with the alleged Rasmark investigation, and that the USCS Group Supervisor Ward Olson ("Olson"), who supervised Ops Transwestern, protested all the way to the then Commission Carol Hallett and to Congressional leaders, the actions of Reay and Lappe´ in removing funds from his lawful investigation to use on a non-related money laundering investigation in El Paso. See letter to Carol Hallett at App.1372; excerpts from Lappe´'s memorandum concerning Olson, detailing information about Ops Transwestern at App.1368-1371; newspaper article in which Olson relates details about his protest at App.1363-1367; and excerpts from Blue Ribbon Panel Report concerning Congressional Hearings on gross misconduct in the Southwest USCS offices at App.1356-1362.

Further support of petitioners' contention of bogus investigation is fact that IRS performed and completed an audit of Rasmark in April of 1992, just a month after the FTF was allegedly formed to investigate the petitioners, declaring a "no change" audit result. (App.1290-1291). Internal Revenue Service ("IRS") SA Fonda Hivick ("Hivick") testified that she might have seen some tax records, (App.552, L20 - App.554, L23); as to Gantkessy, Hivick testified "I don't know who Andrew Gantkessy is." (App.554, pg.39). Hivick also participated in the

matters concerning the box of Rasmark records seized from D. Rasmusson on May 23, 1992; Hivick testified she only saw no evidence of tax evasion, (App.557, pg.41). Federal Bureau of Investigation ("FBI") SA Joe Acosta ("Acosta") also reviewed the documents in the seized box and testified that he saw only normal business records, (App.762-762).

In further support of the petitioners contention of a bogus investigation, the petitioners submitted to the district court documentation of unlawful disclosures and coercion: to M. Rasmusson's ex-wife and her attorney at App.1292-1294; subpoenas to the Rasmussons and Rasmark's banks, App.671, L14 - App.672, pg.39); to the Ford Motor Company ("Ford"), Rasmark's major customer and Gantkessy's employer, at App.1297-1306; and affidavits of Rasmark employees, and/or former employees, and/or business associates, and/or Rasmussons' friends, and/or family: Andrea, App.333-334; Apodaca (Rasmark's accountant), App.335-337; Barron, App.337a-337b; Burnett, App.338-343; Chavez, App.344-346; Enriquez, App.347-349; Farah, 349a-349b; Gorman, App349c-349d; Jackson, App.350-352; Joseph, App.353-355; Ian Maye (D.Rasmusson's in May 23, 1992 incident), App.356-358; Parra, App.358a-358b; Quarles, App.359, Interview of Varela, App.359a-359b; Sambrano, App.359c-359d; Vargas, App.360-361; Interview of Vasquez, App.362-363; Vaughn (concerning USCS refusal to return records seized on November 22, 1993), App.365-367; and Yarber, App.368.

In further support of the petitioners contention of a bogus investigation, the petitioners submitted to the district court representative documentation of unreasonable searches and seizures: incidents occurring as early as 1987 (App.1150, ¶ 1 "We have been delayed for over 2 years by US Customs at El Paso with searches by dog, strip searches, taking the airplane apart, searches of all personal belongings, being rude and uncourteous, even pointing machine guns at us with my wife and son on board"); October 7, 1988 incident non international flight, at App.341-342, ¶ 5); summer of 1990 another non border incident, App.342,¶ 6; 1990 "Teddy Bear" incident, at App.259, ¶ 12; May 23, 1992 incident and prior history at App.296, ¶ 13-29;

November 10, 1992 incident at border where D. Rasmusson arrested for alleged switchblade knife and her car seized for alleged .1 gram of marijuana, at App.307, ¶ 30-32; Frost denied he had anything to do with the seizure of her car at App.960, ¶ 45; and also see, Frost's signature on USCS Custody Receipt For Retained or Seized Property dated November 10, 1992 at App.1295-1296; more unlawful searches of aircraft on domestic flights at App.350-351 and September 1, 1993 at App.352; numerous unlawful alleged trash pick ups repeatedly finding important Rasmark records at App.933, ¶ 82-86; 935, ¶ 89; 936, ¶ 92; 937, ¶ 102; 938, ¶ 103-106; and 940, ¶ 109-114; State respondent Neil Baker ("Baker") testified he participated in numerous trash pickups at App.863-872 and numerous surveillances at App.886-889; State respondent James Holland ("Holland") participated in surveillance activities at App.622-624. Respondent George Salas denies being an undercover operative and that he never had the Rasmussons residence and office keys (App.487, pg.38); however, Salas impeached himself later at App.514, pg.79 - App.515, L19.

In further support, petitioners submitted to the district court documentation of unlawful interrogation and coercion of petitioner Gantkessy at App.314-332; 348, ¶ 7; 1478, ¶ 8-10; 1480-1485.

In further support of the petitioners' contention of a bogus investigation, the petitioners submitted to the district court documentation corroborating the fact that the respondents knew for a certainty that neither Rasmussons, Rasmark nor Gantkessy were participating any type of kickback or payoff scheme, yet the respondents placed the false allegations in the November 19, 1993 affidavits. Respondent Acosta testified that he subpoenaed all Ford's records relating to Rasmark, in January of 1993, (App.708, pg.84-86 and1297-1298), and he received the records in about three months later (App.710, L19-23); the purpose, according to Acosta, was to get some idea of the volume of business in relation to money generated and found there was no big difference between the numbers, (App.716-719, L17). Acosta further testified that he was not aware of anyone from the USCS having to be present to assist Ford in complying with the subpoena (App.712-714, L2), contrary to Frost's declaration at App.950, ¶ 11. And further

documentation submitted was the basis of the respondents allegations of kickback and/or payoff schemes between the Rasmussons, Rasmark and Gantkessy, to steal money from Ford through the U. S. Mail service. See App.1320-1322. Respondent Gail Beach ("Beach") and Chris Hines ("Hines") were responsible for fueling the rumormongering mill (App.1307-1318); however, Beach testified that she told Frost her information was based largely on rumors (App.903) and denied she told Frost that the Rasmussons were engaged in a "kick back" scheme with Joe Sudomir and Andy Gantkessy, (App.1049, Admission No.5). Likewise Hines denies he told respondent USCS SA Fred Schroeder ("Schroeder") and EPPD officer James Holland ("Holland") that he believed money was going to Andy Gantkessy (App.1061, Admissions No. 6). Hines further denies he told the same respondents that D. Rasmusson said she owed Gantkessy some money but could not put his name on the check, (App.1062, Admission No.12); further denials by Hines at App.1063.

In further support of the petitioners' contention of a bogus investigation, the petitioners presented to the district court documentation of the respondents' knowledge that they knew the basis of the Rasmusson's lifestyle from the divorce papers, which Frost cites in his affidavit at App.944, ¶ 119, and that the respondents knew the divorce court had appointed a receiver over all Rasmark's bank accounts, App.1332-1339, controlling the Rasmussons' salaries and expenses.

In further support of the petitioners' contention of a bogus investigation, the petitioners submitted to the district court that after the respondents had executed their unlawful search warrant, seizing all of Rasmark business records, including FAA required maintenance records, and all of their personal and business records at D. Rasmusson's residence on Leo Collins Road in El Paso, the USCS refused to return the records, after repeated request from Rasmark, only a few of the records were reluctantly returned, culminating in the Rasmussons and Rasmark filing a motion for return of property in April of 1995 and finally getting over 65 boxes of records returned in May of 1995. See App.1341-1351.

In further support of the petitioners' contention of a bogus investigation, the petitioners submitted to the district court documentation showing the respondents failed to follow reasonable policies and procedures that the respective respondent agencies had agreed to follow, unless the particular agency's policies were more restrictive, (App.1127-1136); including case preparation/HIDTA at App.1136-37; and the Financial Disruption Unit handbook at App.1137-1141. The state respondents testified that they were not required to keep their home agency supervisors informed, that their supervisors understood they could not talk about their task force work: Salas at App.480-482; 502-504; concerning the May 23, 1992 incident which Salas set up for the other respondents, App.505, pg.65 - App.514, L25; neither was Salas required to report the May 23, 1992 incident to his supervisor, pg.86, L2- pg.87, L20; also, pg.32, L10-25; pg.46, L4-18; (Record, Salas January 10, 1997 Depo). Holland: his immediate supervisor at EPPD at pg.11, L9-23; regarding discussions with his supervisor, where Holland testified that he could not discuss entirely what he was doing on the task force because it was understood that he was dealing with Grand Jury material and that his supervisor was not part of the investigation; and that USCS SA Frost had ultimate control see pg.13-16, L10; even though EPPD was a partner in the previous DEA OCDETF investigation against Flores and M. Rasmusson, Holland did not review EPPD files, although he knows the officers who were involved; see pg. 16, L20 - pg.20, L10; and more of similar import. Respondent Neil Baker ("Baker") of the El Paso County Sheriff's Department ("EPSD") testified his immediate EPSD supervisor was Lt. Gabbert but USCS SA respondent Schroeder supervised during task force tasks, (App.842-851, pg.23, L2); Baker also testified to pressure he felt and conflict between his supervisor and the task force, and instructions from Lt. Gabbert "were suggestions. . . ." (pg.67, L8- pg. 73, L8); and other testimony of similar import.

Finally, the petitioners submitted to the district court documentation that the Rasmussons and Rasmark were a growing business known for its quality service and reasonable cost and a good corporate citizen participating in the community at large, which were the reasons for Rasmark's success and the unyielding bitterness of

respondent Gail Beach ("Beach"). See App.1323-1131).

Because of the foregoing continuing violations, the Petitioners M. Rasmusson first filed a timely claim with the Respondents respective Federal agencies on or about June 12, 1995 and received a final response dated January 16, 1996 (App.120a-120c). However, before receiving the response, the Petitioners filed their lawsuit in the District Court for the Western District of Texas on November 21, 1995.

After the Petitioners agreed to numerous extensions of time for the Respondents to file their answers and/or motions, and the Petitioners filed requests for discovery and various motions to strike portions of certain Respondents' affidavits, the District Court held its first hearing to ascertain status of case and set discovery guidelines. The district court's Scheduling Order (App.100) severely restricted the Petitioners to only twelve depositions with a time limit of two hours each and limited to the precise issue of qualified immunity, although the Petitioners' original complaint named over 30 identified participants in the investigation against the Petitioners, causing the Petitioners to lose access to potential direct evidence of the unlawful investigation. The district court's order regarding plaintiffs' production request for qualified immunity (App.102) also severely restricted the Petitioners from obtaining access to direct evidence of the Respondents fabrications and misuse of government funds to support their unlawful investigation against the Petitioners. See Petitioners' request at App.1487.

After the initial Petitioners were joined in the lawsuit by D. Rasmusson and Gantkessy in May of 1996, the district court further denied the Petitioners the opportunity to add the USCS as a party to their Third Amended Complaint. See order at App.106 and order on reconsideration at App.111; see also, Petitioners' motion for reconsideration of the district court's denial to add the USCS at App.1502.

The Petitioners filed objections to the district court permitting the substitution of the United States for the federal Respondents and reconsideration of the court's final order (App.115); the Petitioners

further objected to the court's denial of the plaintiffs motion to compel production of all records that are defendants' basis of good faith for objections to deposition questions or in the alternative, for in camera review (App.117); Petitioners' motion at App.1521. Once it became apparent the district court's repeated negative rulings against the Petitioners in face of overwhelming factual evidence showing the unlawfulness of the Respondents' conduct, the Petitioners filed a motion for leave to file plaintiffs' motion to stay proceedings until such time as Chief Judge Hudspeth has reviewed plaintiffs' motion to (1) strike evidence (2) transfer the matter as a connected case to Chief Judge Hudspeth's Docket, or in the alternative (3) to allow plaintiffs to amend their witness list and offer additional evidence on the issue of qualified immunity; see App.1518. The district court initially denied the plaintiffs' motion in a summarily fashion in its order rendered on the same date of the summary judgment (App.96, ¶24), although the Petitioners requested hearings on at least two occasions (App.1514-17). And finally, the district court denied the Petitioners motion for a new trial (App.1553) treated as a motion to alter or amend judgment (App.119-20).

The present lawsuit is an outgrowth of nearly eight years of continuing constitutional violations against the petitioners, who felt compelled, after years of fear and inability to get the respondents to cease, filed their original petition on November 21, 1995, against over thirty identified participants, culminating in the third amended original petitioner being filed on March 14, 1997. The petitioners explicitly stated in the caption that the USCS is "sued under the Privacy Act only" (App.121-122; and further stated the respondents were being sued in their respective individual capacity for violating rights protected by the First, Fourth, Fifth Amendments, as to federal respondents, and Fourteenth Amendments, as to state respondents. (App.1-23). At the time of filing the original petitioner, the key affidavits of November 19, 1993, were sealed, and had been since their issuance. The affidavits were not unsealed until April of 1996, pursuant to an agreement between the parties allowing the respondents another extension of time. The respondents filed their respective motions to dismiss and in the alternative, summary judgment based on qualified immunity and statute

of limitations. The federal respondents attached their respective declarations and the state, their affidavits. The petitioners filed numerous motions to strike portions of specific affidavits; all motions denied by the court. In a status conference held on August 8, 1996, the district court specifically instructed the petitioners that only the issue of qualified immunity is to be considered in the twelve depositions being allowed, with each deposition not to exceed two hours in length. (App.100-101). The court specifically stated that "I'll let the attorney representing the witness being deposed ask clarifying and follow up questions. All other attorneys are going to be very limited in any questions they can ask a witness. Because this is not a general discovery deposition." (Supp.Record on Appeal, pg. 61). Pursuant to the status conference, the petitioners submitted their production request on the issue of qualified immunity. (App.1487-1501). The district court severely restricted the petitioners' production request, (App.102-105),denying petitioners access to direct evidence on material issue of the lawfulness of the respondents' investigation from the beginning. The petitioners have filed various 56(f) motions, in particular, regarding the private respondents; all motions denied. The net effect of the district court's severe restrictions was to prevent the petitioners from access to probative evidence on material issues of fact where such evidence was in the sole possession of the respondents. During the depositions, the respondents consistently used evasive and obstructive tactics, raising objections such as "ongoing investigation", "investigative technique", "grand jury material", "irrelevant to qualified immunity", confidentiality, and "confidential informant information", resulting the petitioners motion to compel production of all records that are defendants' basis of good faith before the court and basis for objections to deposition questions or in the alternative, produce for in camera review. (App.1521-1539); the district court denied the initial and reconsideration motions. (App.117-118). Based on new information obtained upon petitioner Gantkessy joining the lawsuit, the petitioners filed their motions to add the USCS as a party-defendant, pursuant to the Privacy Act. (App.1502-1513); the district court denied all motions. (App.106-109; 111-114).. The federal respondents filed motions to substitute the United States upon certification; initially denied but later granted; however, the district court denied the petitioners an hearing or

motion for reconsideration, (App.110; 115-116). In the court's summary judgment ruling, the court characterized all claims against the respondents as common law tort and stated all claims against federal respondents only cognizable under the Federal Tort Claims Act (FTCA) and ruled that the record was devoid of any evidence that the plaintiffs filed their claims with the respective agencies, (App.41, ¶ 48; App.46, ¶ 52); however, the plaintiffs were suing under the Bivens Doctrine and were not given an opportunity to present evidence of the filing of their claims, for which all respondent agencies responded, (App.120a-120c). Besides the district court making voluminous factual rulings contrary to the record, key rulings of law were made: (1) that none of the petitioners stated a cognizable action, (App.5, ¶ 1); (2) corporate plaintiff Rasmark cannot maintain a claim under either Bivens or § 1983, and all of its claims, and other petitioners, lie under the FTCA, (App.7, ¶ 7 and App.41-47); and that petitioners failed to carry their burden of proof on the "scope of employment" issue, that the court finds all federal defendants sued in tort were acting witin the course and scope of their employment, (App.44, ¶ 50);(3) Gantkessy failed to state claim under either the First Amendment or any other provision of the constitution or federal law, (App.7, ¶ 8); (4) the district court blatant misrepresented petitioners' allegations of conspiracy as being under § 1985 (App.9, ¶ 11) is not mentioned any where in the petitioners' pleadings; but rather, the petitioners raised conspiracy allegations under § 1983 and Bivens (App.249, ¶ 484), and state law claims, (App.124, ¶ 5;-6; 225, ¶ 399; 236, ¶ 432; 242, ¶ 454; 244, ¶ 464; and under Privacy Act at App.246-249; (5) that all motion to dismiss will be construed as motions for summary judgment; (6) having considered all motions, oral argument and relevant case law, the court is of the opinion that no genuine issues of material fact exist as to any of the claims asserted and that all named defendants are entitled to summary judgment as a matter of law. (App.9, ¶ 12). Out of the district court's detailed discussion of much law and 239 citations, the court somehow failed to mention the petitioners' continuing violation allegations and applicable law. The district court, however, did find that the rights alleged by the petitioners were clearly established constitutional rights, the only issue being whether any of the respondents violated such rights. (App.15, ¶ 19). The court further ruled that the private respondents cannot assert

qualified immunity, (App.15, ¶20); however, the court ruled they were entitled to privilege under 19 U.S.C. § 507(b), for providing information to USCS agents in the course of an investigation, (App.75, § 93-95). The district court further ruled: (1) that the petitioners only sought to carry their burden by showing that some other law enforcement officer, in the shoes of one of the defendants, would have acted differently, (App.19, ¶ 25); that in an effort to avert the statute of limitations bar on a majority of petitioners' claims, the petitioners assert conspiracy, (App.38, ¶ 43), and ruled petitioners' claims against all defendants, except those who participated in the execution of the November 22, 1993 search warrants were untimely, (App.41, ¶47). Although the petitioners presented expert witness affidavits from three retired supervisory level FBI and IRS Special Agents, (Appendix G, App. 1373-1472), in addition to the petitioners' and other supporting affidavits, (Appendix C, App.256-368), the district court ruled it could find no material issues of fact to be tried by a jury. See also, Appendix F, App.1142-1372, for references cited in the foregoing affidavits and other supporting documentation cited elsewhere in the writ.

By time the Petitioners filed their notice of appeal to the Fifth Circuit Court of Appeals, approximately 287 items were listed as entries in the record, which the Petitioners incorporate herein as though each and every item is fully set forth for the Court's review. Petitioners contend, however, that many of the district court's rulings upheld by the Fifth Circuit severely denied Petitioners' due process rights.

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court And In The Alternative, The Court of Appeals Has Sanctioned Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power, By

Summarily Affirming The District Court's Granting Of Summary Judgment On The Issue Of Qualified Immunity To Both State, Federal Respondents Officers And Private Respondents, Despite Substantial Issues Of Material Facts Concerning Officers And Private Parties' Improper Motives And Denying Access To Court, Contrary To Relevant Decisions Of This Court.

In recent years, this Court has established sufficient guidelines for federal courts to follow in determining the issue of qualified immunity on a summary judgment motion. *Crawford v. Britton,* 523 U.S. 574, 118 S.Ct. 1584 (1998); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Creighton,* 483 U.S. 635 (1987); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986) and others. The present case represents a blatant and startling departure from clear precedent. The intent of this Court's precedent concerning qualified immunity doctrine is to limit officials' exposure to such litigation in order to advance three policy considerations. First, the Court fears that it would be unfair to require public officials to compensate plaintiffs for all constitutional violations, given the sometimes unclear nature of constitutional law. *Wood v. Strickland,* 420 U.S. 308, 319-22 (1975). Second, the Court speculates that public officials will be overdeterred in the performance of their duties if they anticipate that every official action they take may lead to a lawsuit. *Harlow,* at 806-807. Finally, the Court believes that the litigation of constitutional may impose substantial costs on individual officials and on the government itself, even when the trial court ultimately finds that the officials are not liable. *Id.* at 814. However, the reasoning in the present case shows little resemblance to what this Court intended in the foregoing precedent.

This Court understood the struggle within the circuits over the issue of improper motive and the surrounding factual issues. Only recently did the Court issue its opinion in which it set forth ". . .a correct understanding of the relationship between . . . *Harlow* . . .and the plaintiff's burden when his or her entitlement to relief depends on proof

of an improper motive." *Crawford* at 1590. In the present case, improper motive and/or improper purpose is the basis of the petitioners' entire lawsuit. In this context, the court of appeals upholding the district court's ruling on the set of facts and evidence adduced before the district court is simply baffling. A question that surfaces is whether the district court was engaging in a genuine struggle over whether it was dealing with insubstantial claims. An affirmative answer might have some validity if the petitioners had not submitted significant probative evidence corroborating their contention that the respondents were engaging in a bogus investigation ad initio. Moreover, the district court's reasoning and factual rulings, those that are discernible and accurately reflect the record, might well implicate procedural due process concerns.

If the policy is for the federal courts to give the public officials a head start, in the present case, the court of appeals has given the entire game without the respondents ever having to appear. If all federal courts follow in the footsteps of the Fifth Circuit, important constitutional rights will be obliterated completely. The net effect of the court of appeals upholding the district court was to grant these respondents absolute immunity, contrary to this Court's precedents. See, *Butz v. Economou,* 438 U.S. 478 (1978) and the President, *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). Under *Harlow,* this Court reiterated its admonishment "that 'insubstantial' suits against high public officials should not be allowed to proceed to trial." See *Harlow v. Fitzgerald,* 457 U.S. 800, 820 (1982). Just a cursory review of the petitioners' third amended original petition exposes the seemingly limitless flaws in the district court's-95-pages-239- citations ruling.

In its zeal to protect public officials, the district court failed to apply the objective reasonableness standard to the respondents' conduct. In fact, the district court states in its opinion that "[b]ecause the Plaintiffs have failed to establish the existence of a constitutional violation, Defendants who participated in the investigation are entitled to qualified immunity without the need for the court to determine whether Defendants' actions were objectively reasonable." See App.56, ¶ 63. The district court does not merely misstate the *Harlow* standard,

it completely eviscerates *Harlow* beyond recognition. Here, the Petitioners have been trying to get answers since 1989, and instead, they were further demeaned by the court. No person within the borders of the U.S. Constitution deserves that type of contempt from any court when the entire purpose of the court is to redress just the type grievances presented by the petitioners. The Rasmussons felt real pain and fear in 1989 when they were humiliated at the border (TAOP at App.133); their employees felt real fear for their lives when confronted with agents raiding the petitioners' aircraft with "machine guns, pistols and shotguns" (TAOP at App.133, ¶ 35-43); D. Rasmusson and her son felt real pain and fear when they were followed to a convenience store, literally attacked by the respondents who stole petitioner's Rasmark records from her, and physically attacked she and her son (TAOP at App.179, ¶ 224); and Gantkessy felt real pain and fear, thinking he was about to have another heart attack, be dragged out of his office like a common criminal, when these respondents showed up at his office unannounced and proceeded to interrogate and threaten him until he finally agreed to anything they said just to get from under that unbearable coercion (TAOP at App.205, ¶ 312-320). Are these examples of the type of "insubstantial claims" contemplated by *Harlow*?

While the public interest cries for an answer to "insubstantial" suits against high public officials, the Constitution equally cries for protection of not just your "hypothetical innocent" but the "true" innocent, such as the petitioners before this Court.

A. The Court Of Appeals In Upholding Ruling Of District Court's Granting Of Summary Judgment To All Respondents Based On Statute Of Limitations When District Court Completely Failed To Address The Petitioners' Allegations Of Continuing Constitutional Violations As Tolling Provisions Under State Law, Contrary To *Wilson v. Garcia*, 471 U.S. 261 (1985).

This Court settled the limitations issue with regard to § 1983 and Bivens claims with its holding that "[o]nly the length of the

limitations period, and closely related questions of tolling and application, are to be governed by state law." *Wilson*, at 269. However, the facts before the *Wilson's* Court did not include allegations of continuing constitutional violations, as in the present case. Texas courts have ably addressed the issues surrounding limitations in the summary judgment context. "A party moving for summary judgment on the basis of limitations must conclusively establish the bar of limitations." See, *Jennings v. Burgess,* 917 S.W.2d 790, 793 (1996), citing *Delgado v. Burns,* 656 S.W.2d 428, 429 (Tex.1983). Furthermore, "[i]f the nonmovant asserts that a tolling provision applies, the movant must conclusively negate the tolling provision's application to show his entitlement to summary judgment." See, *Jennings* at 793, citing *Zale Corp.,* 520 S.W.2d at 891; *Woods v. William M. Mercer, Inc.,* 769 S.W.2d 515, 518 n.2 (Tex.1989). In the present case, the district court only addressed the issue of a conspiracy in its ruling (App.37-41) and never mentioned the issue of continuing violation. Only the federal respondents attempted to address the issue, who stated that "no court to date has accepted this theory [continuing violation theory] in the context of the due process claims." See (Appellees' Brf. At 15, record below). The respondents completely overlook the holding in *Wilson*–that state law determines the applicability of tolling provisions. Has the position of this Court changed?

B. The Court Of Appeals' Decision In Upholding The District Court's Ruling That Affidavits Given Subsequent To The Filing Of Petitioners' Lawsuit By Witnesses Interviewed Years Earlier By One Or More of the respondents, And/or Respondents' Respective Agencies, Regarding Same Matters That Were Subject Of Earlier Interviews Are Irrelevant In The Present Lawsuit To Challenge The Validity Of The Affidavits That Were Used By The Respondents To Obtain Search Warrants, Where The Witnesses Affied They Did Not Make The Alleged Statements In The Earlier Interviews That Are Attributed To Them Or The Alleged Statements Are Either Substantial Misstatements

and/or False, Thereby Violating The Petitioners' Fourth Amendments Rights To Be Free From Unreasonable Searches And Seizures And The Petitioners', Contrary To *Franks v. Delaware,* 438 U.S. 154 (1978) And Other Relevant Cases.

Something is quite baffling about the district court's reasoning that strikes at the heart of fundamental fairness; (App.91, ¶ 114). It is okay for the respondents to reach back to the old Flores case, which was ruled wholly insufficient against petitioner M. Rasmusson, which the Government lost years earlier; retrieve staled facts that were fully prosecuted, or should be deemed fully prosecuted; misstate and misrepresent the staled facts, fabricate new facts that did not even occur in the old case; misstate and misrepresent historical facts about the petitioners, when accurate facts are easily accessible to the respondents in the Government's system of records; pretend to be investigating the petitioners-- writing bogus surveillance reports with absolutely no corroboration, accepting incriminating rumors and/or hearsay with absolutely no corroboration from alleged confidential informants, some of whom were just bitter competitors, and others likely bogus; intentionally and knowingly disclose highly inflammatory false information to petitioners friends, family, bankers, employer and business customers; find voluminous important business documents repeatedly in the trash; accost and attack the petitioners wherever and whenever desired by the respondents; use creative writing to connect and interconnect the old case to the newly fabricated appearance of a case, placed all this in affidavits, and take it to an unsuspecting Magistrate who must make a detached and neutral determination based, unknowingly, on a pack of lies. The district court's reasoning robs a *Illinois v. Gates*, 103 S. Ct. 2317 (1983); *Franks v. Delaware,* 438 U.S. 154 (1978); *Ashe v. Swenson,* 397 U.S. 436 (1970); and *Harlow*, supra, of any meaningful vitality.

C. The Court Of Appeals' Decision In Upholding The District Court's Ruling That The Petitioners' Third Amended Original Petition Does Not Contain Any Kind Of Cognizable Action, And/Or Failure To

State A Claim Under Any Provision Of The Constitution Or Federal Law, Where The Petitioners State Their Claims With Particularity, Decides An Important Question Of Federal Law Concerning Whether Heightening Pleading Requirement Will Replace Notice Pleading In § 1983 And *Bivens* Claims, An Issue That Has Not Been, But Should Be, Settled By This Court.

Traditionally, federal courts have required specificity in pleading, or heightened pleading, of plaintiffs bringing civil rights actions under 42 U.S.C.S. § 1873. In 1993 this Court ruled that heightened pleading was not to be applied in civil rights cases against municipalities, that the heightened standard was inapposite to the liberal system of "notice pleading" set up by the Federal Rules. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 113 S. Ct. 1160, 1163 (1993). However, it is not clear whether this Court meant that heightening pleading is not to be applied in cases only against municipal corporations or also not to be applied against officials in their individual capacities. If this Court's silence on the individual officials was by implication approval of the heightened standard, how high must the plaintiff reach to meet the standard, in light of the voluminous material details the present petitioners submitted, and found by the Fifth Circuit itself, to be deficient?

II.

The Court Of Appeals Has Decided An Important Federal Question That The Conduct Of Government Agents In Originating A Criminal Design, Implanting In An Innocent Person's Mind, While Playing On The Innocent Person's Fears, The Disposition To Believe That Certain Criminal Activities Are Being Carried On, And Attempting To Induce That Person To Assist The Agents In Fabricating A Criminal Nexus For The Expressed Purpose Of Using That Fabricated Criminal Nexus

Against An Investigatory Target Who Is Not Engaging, Has Not Engaged Or Shown Any Reasonable Indication That He Is Likely To Engage In Illegal Activity Of A Similar Type Being Planted In The Mind Of The Innocent Person And Where There Is No Legitimate Ongoing Sting Operation, Resulting In Continuing Unreasonable Searches And Seizures And Unlawful Disclosures To Non Law Enforcement Third Parties, Resulting In Loss Of Liberty And Property, Constitutes An Abuse Of Government Power Within The Meaning Of The Fourth, Fifth and Fourteenth Amendments, An Issue That Has Not Been, But Should Be, Settled By This Court?

Here the Court must travel through murky legal waters concerning the sanctity of law enforcement investigations. The parameters surrounding investigations have become so broad that the innocent person stands defenseless when faced with the formidable law enforcement industry, where local, state and federal agencies, including prosecutors assigned specifically to the task forces, are combined in each other's task forces, with little or no accountability to anybody, not even their own supervisors. This Court has long expressed its admonitions against investigatory conduct that amount to gross abuse of authority. *Sorrell v. United States*, 287 U.S. 435, 441 (1932), in the entrapment line of cases. Understandably, law enforcement need to keep pace with the criminal, in the present case, the respondents overstepped the line between setting a trap for the 'unwary innocent' and the "unwary criminal"; these respondents knew from the beginning they were dealing with the "unwary innocent" [*Sherman v. United States,* 356 U.S. 369, 372 (1958)], their ultimate goal was to destroy the petitioners for having compared their conduct to "Nazi Gestapo tactics" to Congressional leaders. Unlike the entrapment line of cases where the Court considered the issue of predisposition to commit a certain crime, *Jacobson v. United States,* 503 U.S. 540, 542 (1992), the innocent person invites no law enforcement scrutiny. The present respondents used the pretext of the DEA OCDETF investigation concerning a known

criminal Flores against the petitioners Rasmussons and Rasmark simply because the respondents knew how to hide their true purpose; for if this was not so, the Government certainly should have prosecuted all of the other legitimate businesses who provided services to Flores and who were paid in cash. The only difference between the petitioners and the other legitimate business was the fact that the petitioners exercised their fundamental constitutional right to protest what they perceived as bad government conduct. In *United States v. Russell,* 411 U.S. 423, 431 (1973), this Court stated that some day it may "be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." These petitioners stand before this Court without a shred of protection, except for the hope that lies in *Russell.* Is this such an occasion for this Court to place some parameters on investigation as falling either within Fourth Amendment protection at an earlier stage than probable cause, or as an abuse of governmental power under the Fifth Amendment?

III.

The Court Of Appeals Has Decided An Important Federal Question In Upholding The District Court's Ruling That Conduct Of Respondent Agents and Private Parties, Where The Agents Solicited Rumors And/Or False Information From Private Parties Who In Term Intentionally And Knowingly Related Rumors And/Or False Information To Agents; Where Respondent Agents Placed In Their Affidavits And The Government's System Of Records, Voluminous Misstatements, Misrepresentations, False Statements And Fabrications Material To Probable Cause And Other Just Outright Inflammatory And Vicious; Where Supervisors, Prosecutors, And /Or Assistant U.S. Attorneys, Intentionally And Knowingly Approve, Condone, Ratify, Or Acquiesce To Respondents' Misconduct, All For

Expressed Purpose Of Causing Petitioners To Be Subjected To Unreasonable Searches And Seizures And For Expressed Purpose Of Making Unlawful Disclosures To Non-Law Enforcement Third Parties, Where No Extant Criminal Nexus, Thereby Resulting In Loss Of Liberty And Property, Constitute Fourth, Fifth And Fourteenth Amendment Violations, Contrary To *Bryson v. United States,* 396 U.S. 64 (1969); *United States v. Wong*, 431 U.S. 174 (1977); *La Chance v. Erickson,* 522 U.S. 262 (1998), And Other Relevant Cases.

The court of appeals has effectively eviscerated this Court's holdings that falsehoods will not be tolerated. In *Bryson*, the Court said: "Our legal system provides methods for challenging the Government's right to ask questions–lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Bryson* at 72. This Court expects no more of the respondents than from all other persons before any court. While a criminal defendant has a right to testify, that right does not include the right to commit perjury, *Nix v. Whiteside,* 475 U.S. 157, 173 (1986); neither do witnesses appearing before grand jury. This Court's position is clear that "the predicament of being forced to choose between incriminatory truth and falsehood . . . does not justify perjury." *United States v. Wong,* 431 U.S. 174 (1977). In the present case, the respondents' lying has defeated the petitioners' right to redress for grievous wrongs. Are the respondents to be protected from their intentional and knowing conduct when they lied in affidavits, declarations and depositions, all conflicting internally and with each other? If the President of these United States cannot lie, even about his most personal and intimate life, neither should the respondents-subordinates be permitted to lie about continuing constitutional violations concerning fundamental rights committed against the innocent petitioners.

IV.

The Court Of Appeals Has Decided An Important Federal Question In Upholding The District Court's Ruling Denying The Plaintiffs' Motion To Stay Proceedings Until Such Time As Prior District Court Judge, Who Has Unique Knowledge Of His Personal Subjective Thoughts Behind Rulings Which Effectively Invalidated Or Discredited Evidence Adduced In Criminal Trial And Now is Being Asserted By Respondents, Has Reviewed Plaintiffs' Motion To (1) Strike Evidence (2) Transfer Matter As A Connected Case To Prior District Court Judge's Docket, Or In The Alternative, (3) To Allow Plaintiffs To Amend Their Witness List And Offer Additional Evidence On Issue Of Qualified Immunity Constitutes Denial Of Procedural Due Process Under Fifth And Fourteenth Amendments So As To Restrict Plaintiffs' Access To Court, An Issue That Has Not Been, But Should Be, Settled By This Court?

Underpinning the petitioners' question is whether the respondents had been successful in their scheme and subjected M. Rasmusson to a new criminal trial using the same facts from the previous trial, in which he received a judgment of acquittal, would such ruling of the district court implicate Double Jeopardy Clause issues? Likewise, the respondents having failed in advancing their scheme, and in the present lawsuit where the district court blatantly disregards plain facts, the petitioners realizing that the appearance of prejudice is a reality, thus seek to have the case transferred to the very judge who has unique knowledge of his personal subjective thoughts behind his rulings which effectively invalidated or discredited evidence adduced in the criminal trial and now being asserted by the respondents, which motion is denied, does such denial implicate procedural due process in the same manner as double jeopardy? Clearly, if the respondents had succeeded, in the words of this Court in *Green v. United States,* 355 U.S. 184 (1957), the results are unavoidable, namely: "thereby subjecting [the petitioners] to embarrassment, expense and ordeal and compelling [the

petitioners] to embarrassment, expense and ordeal and compelling [the petitioners] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [the petitioners] may be found guilty. *Id.* at 187-188. A review of the petitioners' affidavits corroborates this Court's prophetic words spoken over a quarter of a century before the events in question. This Court addressed the meaning of the judgment of acquittal and instructed the Fifth Circuit Court of Appeals and other lower courts that they "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply co.*, 430 U.S. 564, 571 (1977). In the present case, the Honorable Judge Hudspeth took the time and detailed the elements of Count Nine before he ruled "there's not sufficient proof . . ." and that "suspicion, of course, is not enough." (App. 1288-1289) Under the facts of the present lawsuit, a writ should issue to decide in the civil context the interplay of the petitioners' motion and due process.

CONCLUSION

History and modern day civil wars teach us that when the Government closes its eyes to its own abuses and expects the citizenry, such as the petitioners, to accept in silence, like a child, then we all must braced ourselves for sudden and unexpected rebellious outcry. The petitioners pray that this Court grants the writ of certiorari, thereby restoring some measure of trust and balance, once again, between "we the people of these United States" and our public servants, and in particular, restoring some measure of trust and hope in the petitioners that our courts are here for the purpose of ensuring justice for all.

DATED: February 8, 1999

Respectfully submitted,

SHEPPARD & ASSOCIATES

Sandra Jackson Sheppard
Texas State Bar #00786414
6915 Boeing Drive
El Paso, Texas 79925
(915) 772-4616 - Telephone
(915) 778-5773 - Facsimile

ADDENDUM TO

APPENDIX H
SUPPLEMENTAL APPENDIX

REPLACEMENT TO

APPENDIX B

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

EXCERPTS FROM THE PRIVACY ACT, 5 U.S.C. §

. . . **(b) Conditions of disclosure.** No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the

particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31. . . .

. . . **(e) Agency requirements**. Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any party of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include–

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at

his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources or records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment,

inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) [Caution: For effective date, see 1988 Amendment note] if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register
notice of such establishment or revision.

. . . **(g) Civil remedies.**

(1) Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the
individual; or

(D) fails to comply with any other provision of this section, or any

rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery

receive less than the sum of $ 1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON,	§	
RASMARK JET CHARTER, INC.,	§	FILED: March 14, 1997
DEBORAH L. RASMUSSON,	§	
ANDREW A. GANTKESSY,	§	
	§	
PLAINTIFFS,	§	CIVIL ACTION:
	§	EP-95-CA-475-F
VS.	§	JURY DEMAND
	§	
LAWRENCE E. FROST,	§	
GEORGE J. WEISE,	§	
CAROL B. HALLETT,	§	
JOHN E. HENSLEY,	§	
DONALD L. REAY,	§	
MICHAEL T. LAPPE,	§	
MICHAEL J. WILCZEWSKI,	§	
FRED J. SCHROEDER,	§	
WALTER J. KING,	§	
LARRY BROWN,	§	
ERIC MILLS	§	
STEVEN ERIC PERKINS,	§	
ELI P. CHAVEZ	§	
RAPHAEL AGUIRRE	§	
TOM LENOX,	§	
FONDA R. HIVICK,	§	
ROBERT L. MARTINEZ,	§	
JOE ACOSTA,	§	
	§	
ARE SUED IN THEIR	§	
INDIVIDUAL CAPACITY,	§	
	§	
UNITED STATES CUSTOM	§	
SERVICE, (sued under THE	§	